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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE DZIAMNISKI,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 07-604
v.	)	
	)	The Honorable David Cercone
KIRKPATRICK & LOCKHART,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

I. INTRODUCTION

The present case was filed by Plaintiff George Dziamniski, *pro se*, on May 8, 2007. To date, Defendant Kirkpatrick & Lockhart Preston Gates Ellis LLP ("K & L Gates") has not been served in accordance with the Federal Rules of Civil Procedure. Despite not receiving an executed waiver of service of summons and not having properly served K & L Gates with notice of the instant lawsuit, Plaintiff filed a Motion for Default Judgment on July 25, 2007, requesting that judgment be entered against K & L Gates in the amount of $10,000,000.00. Under the applicable rules and law of this Circuit, Plaintiff's Motion for Default Judgment must be denied.

II. ARGUMENT

A. Plaintiff Has Not Properly Served K & L Gates

Federal Rule of Civil Procedure 4 provides, in pertinent part:

> **(h) Service Upon Corporations and Associations.** Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:
>
> > **(1)** in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Rule 4(h), referencing Rule 4(e), allows service pursuant to law of the state in which the district court is located, in this case, Pennsylvania. Pennsylvania Rule of Civil Procedure 423 provides that original process shall be made on a partnership by serving the original process upon (1) any partner, officer, or registered agent of the partnership; (2) an agent authorized by the partnership in writing to receive service of process for it; or (3) the manager, clerk or other person for the time being in charge of any regular place of business or activity of the partnership. Service by mail is not effective under the Federal or State rules.

When there has been no waiver of service as provided for under FED. R. CIV. P. 4, both the Federal and State rules provide that service must be made in person to be effective. *See Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 880 (3d Cir.

1987). The Third Circuit, in *Green*, noted the import of strictly complying with Fed. R. Civ. P. 4:

> Actual notice, then is of paramount importance to the scheme contemplated by Rule 4. Although the district court's conclusion that service be deemed made upon receipt is not at odds with the goal of actual notice, we think that interpretation may unnecessarily burden the parties and the courts with discovery requests and evidentiary hearings whenever there is a dispute. We think the better approach, where receipt has not been verified by return acknowledgment, is to require personal service upon the defendant.

Green, 816 F.2d at 881; *see also Stranahan Gear Company, Inc. v. NL Industries, Inc. v. Blue Streak Industries, Inc. et al.*, 800 F.2d 53, 56 (3d Cir. 1986); *Legrand v. McCrea*, 1992 U.S. Dist. LEXIS 16348 (E.D. Pa. 1992) (rejecting plaintiff's contention that strict compliance with Fed. R. Civ. P. 4 is not required for effective service if defendants had actual knowledge of the action because the Third Circuit has strictly interpreted the service requirements set forth under Rule 4) (internal citations omitted).

In the present case, Plaintiff has conceded that he did not receive an executed waiver of service of summons from K & L Gates. *See* Motion for Default Judgment at ¶2. Further, Plaintiff asserts that he sent the summons and the Complaint to K & L Gates by Certified Mail on July 2, 2007. *See* Motion for Default Judgment at ¶3. By Plaintiff's own account, he has not made effective service upon K & L Gates, given that Certified Mail is not a means of adequate service under Federal or State rules. Where, as here, Plaintiff has not complied with the explicit requirements of Fed. R. Civ. P. 4, service is not effective.

B. Unless And Until Proper Service Has Been Made And The Time For Responding Has Lapsed, No Default Judgment Can Be Entered Against K & L Gates

The Third Circuit has commented on the importance of the service requirements of Federal Rule of Civil Procedure 4. In affirming the district court's striking of a wrongly entered default judgment, the Court stated, "in drafting the Rule 4 Congress meant precisely what its clear language states and that the mail service is effective only if the provisions of Rule 4(c)(2)(C)(ii) [relating to waiver] are complied with literally." *Stranahan Gear Company, Inc.* 800 F.2d at 56. The Court rejected the plaintiff's contention in that case that literal compliance with Rule 4 is not required because the defendant's president admitted that it had received the summons and complaint. *Id.* The Court noted that until service was made in literal compliance with Rule 4, no default judgment could be taken. *See id.*, *see also Gold Kist, Inc. v. Laurinburg Oil Co.*, 756 F.2d 14, 19 (3d Cir. 1985) (stating "A default judgment entered when there has been no proper service of the complaint is, a fortiori, void, and should be set aside.").

As discussed above, Plaintiff has failed to properly serve K & L Gates with the summons and complaint in this case. Plaintiff concedes that he did not receive an executed waiver of service of summons, and also that he sent the summons and complaint by Certified Mail. The plain language of both FED. R. CIV. P. 4 and of PA. R. CIV. P. 423 demonstrates that service by mail is not an effective means of service upon an in-state partnership. As such, a default judgment cannot be entered unless and until Plaintiff has properly served K & L Gates, and K & L Gates has failed to file an appropriate response to the complaint. S*ee Gold Kist, Inc.*, 756 F.2d 14.

III. CONCLUSION

For all of the foregoing reasons, Defendant Kirkpatrick & Lockhart Preston Gates Ellis LLP respectfully requests that this Court deny Plaintiff's Motion for Default Judgment in its entirety.

Respectfully submitted,

s/ James W. Carroll, Jr.

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CERTIFICATE OF SERVICE

I, James W. Carroll, Jr., certify a true and correct copy of the foregoing Brief in Support of Defendant's Response in Opposition to Plaintiff's Motion for Default Judgment was served upon the following persons via first class, postage prepaid mail, this 3rd day of August, 2007:

George Dziamniski
4177 Finley-Elrama Road
Finleyville, PA 15332

s/ James W. Carroll, Jr.
James W. Carroll, Jr.